CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: June 4, 2004

TO: DNR Shoreland Zoning Program staff

FROM: Linda Meyer – Bureau of Legal Services

SUBJECT: Wis. Supreme Court Decision in *State v. Waushara County Board of Adjustment*

On May 18, 2004, the State Supreme Court issued a 4 to 2 decision in the case of *State v. Waushara County Board of Adjustment.* (Two members of the Court, Chief Justice Abrahamson and Justice Bradley, dissented. Justice Roggensack did not participate in the case.) In the *Waushara County* decision, the Court considered (for the second time in two months) the question: What is the correct legal standard to be applied by a board of adjustment when considering whether to grant an area variance?

On March 19, 2004, in *State ex rel. Ziervogel v. Washington County Board of Adjustment*, the Supreme Court issued an opinion that held that the "no reasonable use" standard for measuring "unnecessary hardship" when a property owner requests a variance, that was applied in the Supreme Court's 1998 decision in *State v. Kenosha County,* should only be applied to use variances. In the *Ziervogel* opinion, the Supreme Court quoted from its 1976 decision in the *Snyder* case to define "unnecessary hardship" in area variance cases:

> "When considering an area variance, the question of whether unnecessary hardship . . . exists is best explained as 'whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would **unreasonably prevent the owner from using the property for a permitted purpose** or **would render conformity with such restrictions unnecessarily burdensome.**' " (emphasis added) *Snyder,* 74 Wis. 2d at 475 (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972*)*

The Court's opinion in *Ziervogel* went on to clarify that whether this area variance standard is met in individual cases depends upon a consideration of the purposes of the zoning restriction in question and the effect of a variance on those purposes.

Consistent with its holding in the *Ziervogel* decision, the Supreme Court concluded in the *State v. Waushara County Board of Adjustment* decision that:

- A board of adjustment "should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists."
- "[T]he facts of the case should be analyzed in light of the purpose."
- "[B]oards must be afforded flexibility so that they may appropriately exercise their discretion."
- There is a "presumption that the board's decision is correct."
- "*Snyder*'s definition of the statutory term 'unnecessary hardship' . . . best encompasses the appropriate test for granting an area variance."
- There is "no need to accept the Howes invitation to overrule *Kenosha County*."

Facts of the Case

The property owners in the *Waushara County* case (G. Edwin Howe and Suzanne Howe, whose principal residence is in Elm Grove, Wisconsin) own a .324 acre parcel of land on Silver Lake in Waushara County. The lot is not large enough for a house to be built that conforms to both the 75-foot water setback and the 110-foot highway setback required by the Waushara County Ordinance. The Waushara County Ordinance allows for setback averaging, but under that provision, the Howes could build no closer than 35 feet from the ordinary highwater mark of Silver Lake. The Howes have an existing two-story home on the lot, which they have used as a second home, that is between 30 and 34 feet from Silver Lake. This home has a footprint of approximately 1,300 square feet.

The Howes applied for, and were granted, variances in 1989 and 1994 that allowed them to enlarge their home because they wanted to convert it to a year-round residence. In 2001, the Howes applied for a third variance to construct a 10-foot by 20.5-foot addition to their living room (with a full basement) and to build a 4-foot by 10-foot porch. The Waushara County Board of Adjustment granted their variance request. The State of Wisconsin, at the request of the DNR, appealed the board's variance decision on the grounds that the Howes already had reasonable use of their property without a variance. The Waushara County Circuit Court reversed the board's decision and the Court of Appeals affirmed the circuit court's decision. The Supreme Court reversed the Court of Appeals decision after concluding that the matter should be remanded to the Board of Adjustment for a determination as to whether the area variance standard described in the *Snyder* decision is satisfied in this case.

The Significance of the Decision

In the *Ziervogel* case, Washington County and the State of Wisconsin argued before the Supreme Court that it was not necessary to create a distinction between area variances and use variances in order to distinguish the *Kenosha County* decision (which involved a shoreland zoning variance) from cases where variances are sought from other kinds of zoning ordinances – because the purposes of other kinds of zoning ordinances are so different from the purposes of shoreland zoning. However, in both the *Ziervogel* and the *Waushara County* cases, the Supreme Court has decided that a distinction between area variances and use variances should be made, and in so doing, has limited the applicability of the *Kenosha County* "no reasonable use" standard for determining "unnecessary hardship" to use variance situations.

The Department believes that the *Waushara County* decision is significant for several very important reasons:

1. The Supreme Court repeatedly emphasized in the *Waushara County* decision that a board of adjustment, in evaluating whether to grant an area variance, should focus on the purpose of the zoning law at issue to determine whether an unnecessary hardship exists.
2. The Supreme Court explained that there was no need to overrule the *Kenosha County* decision because the Court's holding in the Kenosha County case was "wholly consistent with the reasoning regarding a focus on the purpose of the ordinance set forth in *Snyder* and *Outagamie County*." The Court states that "it is evident that this court has consistently noted that the purpose of a zoning ordinance should not be lost sight of

when determining whether the variance requested should be granted." *Waushara County*, ¶ 32.

3. It is apparent from the Supreme Court's discussion as to how the Court's decisions in the *Snyder*, *Kenosha County*, *Outagamie County*, *Ziervogel* and *Waushara County* cases can be reconciled that:

- The Supreme Court apparently believes that when a property owner proposes to build a structure within the shoreland setback area that is closer to the ordinary highwater mark than an existing structure (the fact situation in *Kenosha County*), taking the purposes of shoreland setback into account means in effect that the property owner must prove that there would be "no reasonable use" in the absence of a variance in order to prove the existence of "unnecessary hardship" because of the important purposes that the shoreland setback serves.

  (I come to this conclusion because the Court has declined to overrule *Kenosha County* and because the *Snyder* area variance standard includes the criteria "unreasonably prevent the owner from using the property for a permitted purpose" which apparently means the same thing as leaving the property owner with no reasonable use. In the *Kenosha County* case, the Supreme Court held that whatever hardship a property owner might suffer - because they were not allowed to build a new structure in the shoreland setback area closer to the ordinary highwater mark than an existing structure – it was not an "unnecessary hardship." The Court apparently concluded that in the Kenosha County situtation, such hardship, if any, was necessary to achieve the purposes of the shoreland setback.)

- The Supreme Court is also apparently saying that boards of adjustment should consider the degree of the deviation from the dimensional standards for which a variance is sought, to determine if the requested variance is really an area variance or would "permit wholesale deviation from the way in which land in the zone is used."

  "While area variances provide an increment of relief (normally small) from a physical dimensional restriction such as building height, setback, and so forth, use variances permit wholesale deviation from the way in which land in the zone is used." *Ziervogel*, ¶ 23.

- The Supreme Court was apparently not convinced by the information in the record before it in the *Waushara County* case that the purposes of the shoreland setback are jeopardized by the expansion of an existing nonconforming structure within the shoreland setback area, assuming that the expansion is not any closer to navigable waters than the original structure (the fact situation in the *Waushara County* case).

  ". . . while there is a claim that the variance implicates shoreland zoning concerns, it should be noted that the proposed addition would not bring the Howes' home any closer to Silver Lake." *Waushara County*, ¶ 2.

It seems clear that, in light of the *Waushara County* decision, county zoning administrators and DNR field staff are going to have to introduce into the record of variance application cases before county boards of adjustment detailed explanations of how the purposes behind the

shoreland setback and vegetative buffer provisions in county shoreland zoning ordinances will be adversely affected by the expansion of existing nonconforming structures within the shoreland setback area, regardless of whether the expansion will bring the structure any closer to navigable waters, in order that the purpose of these zoning provisions will be adequately addressed by boards of adjustment and reviewing courts in the future. New guidance and a revised model letter will be developed for use by DNR field staff to comment on variance applications.

The Department believes that the Supreme Court's emphasis on evaluating the purpose of the zoning restrictions from which a variance is sought in both the *Waushara County* decision and the *Ziervogel* decision means that it will continue to be difficult to obtain a variance from shoreland and floodplain zoning requirements because of the important purposes that these ordinances serve. We should also remember, as Justice Bradley points out in her dissent in *Waushara County*, that section 59.694(7)(c), Wis. Stats., contains four requirements that must be met before a variance can be granted: 1) it cannot be contrary to the public interest; 2) it must be owing to special conditions; 3) there must be an unnecessary hardship; and 3) the spirit of the ordinance must be observed and substantial justice must be done. While the majority in *Waushara County* focuses only on clarifying the third and fourth elements, the first two elements are still important aspects of the variance standard.